BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JAMES NICHOLS Claimant))
VS.) Docket No. 169,753
SUNSHINE BISCUITS) Docket 140. 103,733
Respond AND	ent	\(\frac{1}{2}\)
	OMMERCIAL INSURANCE	
Insurance AND	e Camei	
KANSAS WORKERS	COMPENSATION FUND	}

ORDER

ON the 1st day of March, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Steven J. Howard dated January 14, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney Robert W. Harris of Kansas City, Kansas. The respondent and its insurance carrier appeared by and through their attorney Gary R. Terrill of Overland Park, Kansas. There were no other appearances.

RECORD

The record in this matter consists of the transcripts of hearings dated November 17, 1992, and November 2, 1993. The record also includes depositions of John Lallement dated November 30, 1993, and Maria Garcia dated November 30, 1993, as well as all pleadings filed of record.

STIPULATIONS

The Appeals Board adopts the stipulations set forth in the January 14, 1994, Award of Administrative Law Judge Steven J. Howard.

ISSUES

After stipulations were taken there remained five issues for decision by the Administrative Law Judge. The first listed issue was whether claimant sustained accidental injury arising out of and in the course of his employment with respondent. The Administrative Law Judge found that he did not and accordingly did not reach the remaining issues. The claimant appeals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board agrees with the decision of the Administrative Law Judge and finds that claimant has failed to establish by a preponderance of the credible evidence that he sustained accidental injury arising out of and in the course of his employment with respondent.

Claimant alleged and testified that he was injured while attempting to lift a tin of Cheez-Its on August 28, 1992, in the course of employment with respondent. He testified that he notified his immediate supervisor, Maria Garcia, on the date of the injury. According to his testimony, the injury occurred on a Friday and he worked the remaining hour and one-half to two hours left in that day's work. Over the course of the weekend, his conditioned worsened. He did not go to work on Monday and on Tuesday, September 2, 1992, he went to the emergency room at North Kansas City Hospital. Claimant acknowledged that he had back problems which date back to 1990, but claims the incident lifting the tin of Cheez-Its on August 28, 1992, caused a sharp pain in lower back about six inches above his belt line. According to claimant, he called and reported the accident to Mr. Lallement, the human resources manager, who refused to send him to a doctor.

The testimony of claimant is, however, contradicted by medical records introduced and the testimony of Maria Garcia and John Lallement. The emergency room records from his initial visit on September 1, 1992, to the North Kansas City Hospital reflect a history of injury of moving boxes at home on Sunday with an onset of back pain. His immediate supervisor, Maria Garcia, testified that she did not recall the claimant telling her anything about an incident or complaining about his back. The Human Resources Manager, John Lallement, testified that claimant did not report any injury or accident to him. He specifically denied that claimant had called him on August 31 and reported an accident or that he had refused to send claimant to a doctor. Mr. Lallement indicated that he first learned of the accident from the insurance carrier in October or November of 1992. The medical records of Dr. Janssen reflect that he first saw claimant on September 17, 1992, for an injury which dated back to September 21, 1990.

The Appeals Board is charged with reviewing and weighing the evidence in performing a de novo review. In so doing, the Appeals Board is entitled to and does give some weight to the fact that the Administrative Law Judge has had the opportunity to observe claimant's testimony. See, e.g., Kroger Co. v. Morris, 14 Va. App. 233, 415 S.E.2d 879 (1992); Gale v. Hefty's Corp., 46 Or. App. 809, 613 P.2d 108 (1980). After observing claimant's testimony in this case, the Administrative Law Judge denied benefits. In light of that fact, and based upon the Appeals Board's review of the record as a whole, the Appeals Board concludes that claimant has failed to meet his burden of establishing that he suffered accidental injury arising out of and in the course of his employment. Accordingly, the decision of the Administrative Law Judge is hereby affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated January 14, 1994, is hereby affirmed.

Dated this _____ day of May, 1994. BOARD MEMBER BOARD MEMBER

Robert W. Harris, 505 Sec Bank Bldg, 707 Minnesota, Kansas City, KS 66101 Gary R. Terrill, PO Box 12290, Overland Park, KS 66212 Steven J. Howard, Administrative Law Judge George Gomez, Director

BOARD MEMBER

CC: